

An extended separation of powers model as the theoretical basis for the representation of future generations – history of political thought groundwork

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Abstract

The growing library on the representation of future generations provides the interested reader with more and more examples of institutions for intergenerational justice, e.g. the Commission for Future Generations in Israel, the Ombudsman for Future Generations in Hungary or the Parliamentary Advisory Council for Sustainable Development in Germany. However, the long-term success of this institutionalisation remains fragile as long as the classical separation of powers model dividing political power into legislative, executive and judicial branches is not called into question. This article argues that the theoretical starting point for any attempts to institutionalise sustainability should be an extension of the ruling model. The century-old separation of powers into three branches as designed by Montesquieu in 1748 is not fitting for modern times. A new four-powers model must include an institutional level that would bring the interests of posterity into the decision-making processes of today. The present demos of the 21st century can negatively affect the living conditions of future demos much more than in earlier times. In the 18th century in the course of the first introduction of democracy in a country in the modern sense of the word (i.e. a country other than an antique polis) the concept of ‘checks and balances’ evolved in the *Federalist Papers*. It was designed to protect parts of the population against the “tyranny of the majority”. Today we need temporal checks and balances in order to protect future generations from a “tyranny of the present”. In this article, the history and justification of the original separation of powers model is explicated and the pros and cons of an extension of this model with a fourth power representing the interests of future people are discussed.

Contents

An extended separation of powers model as the theoretical basis for the representation of future generations – history of political thought groundwork.....	1
1. Introduction	3
The presentism of democracies	3
The representation gap	4
Lack of liability for inadequate performance in office.....	6
Democracy: A valuable political legacy for future generations	7
2. An extension of the separation of powers model	7
Outlining a new idea	7
The cuboid of institutions against presentism.....	9
Counterarguments against the extended power-sharing model with a future branch	14
Key research questions	16
3. The historical and ideational roots of the separation of powers	17
John Locke	18
Charles de Montesquieu.....	20
Federalist Papers	24
From the past to the present	27
Summary.....	29
Bibliography	30

1. Introduction

The presentism of democracies

Only recently has the field of political science put a stronger emphasis on the identification and systematic analysis of 'presentism'¹ in political systems as a challenge in its own right.² The intellectual foundation is grounded in an ethic best expressed by the concepts of 'sustainability' and 'generational justice'.³ Both voters and those they elect are not free from short-sighted and 'presentist' interests, or, at the very least, interests with benefits they will live to experience. The costs of these choices typically are passed on to the future. The rhythm of democracy keeps time with the beat of election terms, usually periods of time of four or five years. The interests of incumbents lie in getting re-elected; non-incumbents strive to be elected. Making this assumption does not insinuate that politicians are a 'type' concerned only with power, position and privilege. Even politicians who want to execute reasonable and sensible policy require the power to do so, and this power is only available in holding an elected office.

In soliciting votes, every party must concentrate on the preferences of the present constituency. Future people are not voters today and cannot be included in calculations as to how to maximise votes. If a politician, regardless of her party, wants to act beyond the scope of the next election, she is at a disadvantage in competition with her 'presentist' oriented political opponents. In *Considerations on Representative Government* (1861), John Stuart Mill made a statement that is, mutatis mutandis, still highly topical: "Rulers and ruling classes are under a necessity of considering the interests and wishes of those who have the suffrage; but of those who are excluded, it is in their option whether they will do so or not; and, however honestly disposed, they are, in general, too fully occupied with things which they must attend to to have much room in their thoughts for anything which they can with impunity disregard."⁴

¹ The term 'presentism' is defined by Thompson 2010, p17, as "a bias in the laws in favor of present over future generations". I use the term in the sense of a general bias in favor of the present over the future. Political 'presentism' must not be confused with short-termism. In fact, long-term decisions may be unjust to future generations if they curtail their options. When young people grow up, they create new institutions and forms of culture through a mostly slow but indispensable process, similar to the necessity to modernise (sometimes also to demolish and rebuild) old buildings and facilities (capital) in order to improve them, or build new ones in lieu of them. Every successive generation chooses which knowledge – accumulated by preceding generations – should be preserved and which should be discarded. This tension-filled exchange between generations simultaneously functions as an engine of progress. As long as mankind exists, cultural capital has been and will be subject to intergenerational differences. Parts of it has to be preserved from one generation to the next, but, in part, it also has to be destroyed.

The political right on self-determination of generations was intensively discussed by Thomas Jefferson (1743-1826), James Madison (1751-1836), and Thomas Paine (1737-1809) in the course of the foundation of the United States of America (cf. Wolf 2008; Kley 2003). Jefferson represented the position that every law and therefore every constitution should lose its validity after 19 years, so that every generation could organise itself, with a freedom comparable to the preceding one. Madison disagreed and referred to the uncertainty that would emerge from such an arrangement. Thomas Paine stood on the side of Jefferson and formulated the famous sentence: "Every age and generation must be as free to act for itself in all cases as the ages and generations which preceded it." (Paine 1996, 261). This right was even anchored in the French constitution of 1793. Article 28 declares: "A people always has the right to revise and reform its constitution. No generation can force future generations to comply with its laws." (This very advanced constitution never entered into force. It was boycotted by the Jacobins, who coerced France under their Reign of Terror from autumn 1793 until summer 1794).

² Dobson (1996); Lafferty (1998); Stein (1998); Kielmannsegg (2003); Eckersley (2004); Schmidt (2006); Giddens (2009); Thompson (2010); Jacobs (2011).

³ For an overview of the new ethics of intergenerational justice, see Tremmel (2012, 2009); Gosseries/Meyer (2009).

⁴ Mill (1958), 131.

As studies have shown, a marked 'presentism' in the electorate exists not only in representative democracies, but also in direct democracies like Switzerland.⁵

The representation gap

Future people will have interests just as any of us have interests today. No matter, what concept of democracy one cherishes, its function to aggregate interests and decide conflicts of interests is seldom disputed. A clear expression of it is the so called all-affected principle: "Anyone whose interests are affected by the decisions of a government should have a possibility to influence these decisions."⁶ The all-affected principle was already a justification for 'democracy' since the US Declaration of Independence 1776 and the French Revolution 1789 and dozens of political theorists have related to it in the past centuries. These classic authors held different views, however, on the question who is part of the 'all' in the 'all-affected-principle'. The history of the right to vote is, of course, one of expansion.⁷ Only in the 20. century, political theorists started to count future people in.

And rightly so. The absence of representation of future generations in present-time democracies means that conflicts of interest are decided by the majority of eligible voters, not the majority of those affected by the decision. Future people that are relevantly affected by a decision don't have any influence over it. This 'representation gap' is fundamentally different from deficiencies in the participatory rights of other social minorities or interest groups for which representation is also lacking (e.g. women, the elderly, or foreigners). These groups are present here and now; they can take part in political discourse, write opinion-editorials, appear on talk-shows and in many cases participate in elections. None of these options are available to future people. "The future is another country", states Posner,⁸ paraphrasing that the welfare of future generations is as low on the agenda of political incumbents as the welfare of a foreign country.

If future citizens could assert their interests in the political decision-making process, majority outcomes in important political decisions of the present would be different. Energy policy is a good example: Energy production of present generations, which relies heavily on fossil fuels, provides a high standard of living today, but at the expense of creating serious disadvantages for the medium-term future of fifty to a hundred years. Post-1990 - the year in which the IPCC's First Assessment Report assessed a connection between anthropogenic carbon dioxide emissions and climate change with a 90 per cent probability— presently living generations can no longer legitimately claim ignorance of the consequences of their actions. Scientific analyses indicate that current energy policy intensifies the natural greenhouse effect and causes the global average temperature to rise.⁹ Even to date, anthropogenic climate change

⁵ Bonoli/Häusermann (2010).

⁶ For different, and sometimes conflicting, versions of the all-affected principle, see e.g. Beckman 2013, 778; Dobson 1996, 124. Deliberationists usually subscribe to it as well, e.g. Dryzek 1999, 44, when he states: "an outcome is legitimate to the extent that it has involved deliberation on the part of the people subject to it." Similar Ekei 2005.

⁷ On the history of the right to vote, Bartolini (2000, p. 118) writes: "Prior to the French Revolution, membership in a corporate estate – as the nobility, the clergy, or city corporations – was a condition for access to the vote. After the American and French Revolutions, individual wealth requirements supplanted the early corporate requirements, and suffrage qualifications were usually based on property, income, or tax contribution; education and or other cultural skills; and sex and age. This history of franchise expansion is the history of the progressive lowering of these qualification barriers and thresholds, frequently characterized by important 'reversals', that is, by the disenfranchisement of previously enfranchised people."

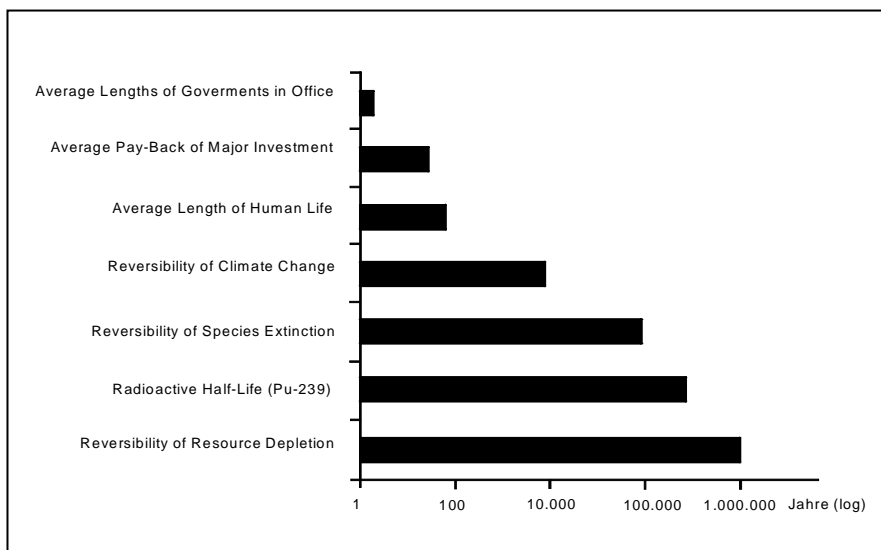
⁸ Posner (2007), 143.

⁹ IPCC (1990).

has costs hundreds of thousands of human lives.¹⁰ And this number of casualties among future people is expected to be a multiple.¹¹ Let's assume that the future individuals born in the next 200 years could partake in the next general election, in the present. The consequence would be that all parties would rewrite their official party positions on today's energy policy and implement a much more rapid decline in carbon dioxide emissions. The same effect could be achieved if a future branch were implemented in the set-up of democracies as a fourth power in the separation of powers model.

Especially with regard to environmental matters, the effects of current actions extend far into the future and have the potential to seriously negatively influence the quality of life of numerous future generations, as figure 1 shows.¹²

Fig. 1: Time Scales for Mankind and Nature



In light of these facts, a prolongation of the legislative session seems appropriate. However, election periods cannot even come close to corresponding to the time span in which the effects of political decisions are felt without restricting voters' influence in such a way that would endanger the very essence of democracy.

Problems posed by the short-sightedness of democracies are not limited to ecological issues. Long before the emergence of modern environmental movements, excessive national debts were considered a prime example of carelessness with regard to the future. As early as 1816 Thomas Jefferson

¹⁰ WHO (2009), 50; Global Humanitarian Forum (2009), 11.

¹¹ World Bank (2013), XXV.

¹² In his book *The Imperative of Responsibility* (1979), the philosopher Hans Jonas lays out in detail the relatively little influence man had on the global, supra-regional nature in the history of humanity up to the on-set of the modern age. In these circumstances, an ethos of responsibility to nature was unnecessary. On the contrary, man was well-advised to approach nature with as much cleverness and efficiency as possible to maximize his utility of its seemingly boundless resources.

discussed potential solutions to this problem.¹³ Insufficient investments in education or failing to adjust pay-as-you-go social security systems are further examples of lacking long-term orientation in political systems.

Modern democracies are either direct democracies (prime example: Switzerland) or organised according to the principle of representation. Both democratic forms are legitimate; the principle of representation is therefore neither an essential element of democracy nor does it contradict it. In this respect, democratic principles do not oppose an extension of the principle of representation to cover future people. The representation of future people is thus compatible with democratic principles. As Göhler notes, "In the broadest sense of the term, representation means to make something invisible visible and something absent present".¹⁴ Thaa adds that representation should be understood as "the visualisation of an absentee".¹⁵ If 'representation' is understood this way, then representing future people is not at all at odds with the principle of democracy as a system of government.

Lack of liability for inadequate performance in office

An additional issue amplifies this orientation to the present: In democracies, politicians' governmental responsibility is for a limited amount of time. Indeed, this is one of the advantages of this system of government. However, it also means that an elected official does not have to assume that his own short-sighted decisions will catch up with him twenty or thirty years later. As soon as a new government comes into power, she is no longer liable.

It is quite the novelty that and for what reason a lawsuit was brought against the former prime minister of Iceland Geir Haarde in June of 2011. Haarde was the prime minister in office when the country's financial system broke down. The Icelandic Parliament, the Althing, voted in favour of a lawsuit against Haarde because he failed to take action during the financial crisis of 2008 which led to the economy's collapse. Haarde is the first person to have to answer to the so-called Landsdomur, an Icelandic special court created in 1905 for lawsuits against Icelandic ministers of state. Haarde pleaded 'not guilty' and called the case the "first politically motivated lawsuit in the history of Iceland. In 2012 Haarde was tried for economic mismanagement on four counts and found guilty of one: not holding meetings of the cabinet when the crisis reached its peak, escaping the most serious charge of negligence.¹⁶ Despite the criminal charge, no punishment followed and the defendant's legal fees were paid for. Describing the verdict as "absurd", Mr Haarde claimed that the special panel which tried him was under pressure from the Icelandic parliament to return a guilty verdict.

Regardless of one's take on the question of guilt concerning the financial crisis, such a case is a unique approach that has not been even remotely considered by other countries affected by the financial crisis (Greece, Portugal or Ireland). The introduction of a criminal offence statute that would make political

¹³ On May 28, 1816, Thomas Jefferson wrote in a letter to John Taylor: "Funding I consider as limited, rightfully, to a redemption of the debt within the lives of a majority of the generation contracting it; every generation coming equally, by the laws of the Creator of the world, to the free possession of the earth He made for their subsistence, unencumbered by their predecessors, who, like them, were but tenants for life. (...) And I sincerely believe (...) that the principle of spending money to be paid by posterity, under the name of funding, is but swindling futurity on a large scale." Cf. Jefferson (1999).

¹⁴ Göhler (1992), 109.

¹⁵ Thaa (2011), 151.

¹⁶ BBC (2012)

decision-makers liable¹⁷ for knowingly creating policy that would put future generations at a disadvantage has no chance of being implemented on a broader scale.

Democracy: A valuable political legacy for future generations

There is a clear demarcation between the opinions expressed in this paper and those which question the very idea of democracy. Subsequent to the failed climate change conference in Copenhagen (2009) and the ambivalently evaluated follow-up conferences in Cancún (2010), Durban (2011), Doha (2012) and Warsaw (2013), publications which question whether democracy is the right form of government to overcome ecological challenges increased in quantity.¹⁸ This provocative question, even if is often met by an affirmative response, is unconstructive. The international climate change conferences are in fact a bad example to use because it was not only the democratic, but also the non-democratic states which took part in the failed talks.¹⁹ Moreover, comparative studies have demonstrated that the ecological performance of authoritarian regimes is far worse than that of democracies.²⁰ Instead of criticising democracy per se, time and resources would be better invested in the further development of democracy. That democracy needs to be reformed does not mean to place the very concept of democracy in question. Churchill touched on the heart of the matter with the following words: "No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time; but there is the broad feeling in our country that the people should rule, continuously rule, and that public opinion, expressed by all constitutional means, should shape, guide, and control the actions of Ministers who are their servants and not their masters."²¹ Democracy itself is one of the most valuable legacies which future generations can inherit from present generations.

2. An extension of the separation of powers model

Outlining a new idea

Democracy, as it until now been conceived of and practiced, has to a large extent ignored the problem of its own presentism. Established founding theories of democracy offer no solution to the presentism of our political system. To what extent can an extension of the separation of powers model act as a corrective? This key question has been neglected in the literature up to date. For the sake of the argument, this text assumes that the centuries-old separation of powers between the legislative, executive and judicial branch is no longer appropriate. In order to make the political system future-oriented, a new (fourth) institution, which ensures that the interests of future generations are taken into account in today's decision-making process, is needed. It cannot be doubted that the consequences of

¹⁷ One such plan, though not fully developed, can be found in Jodoin (2010).

¹⁸ For example: Shearman/Smith (2007); and to a certain degree also Leggewie/Welzer (2009 a,b) in an otherwise very informative contribution to the literature.

¹⁹ Saretzki (2011), 42.

²⁰ Weidner and Jänicke (2002). Concerning law, Jänicke (1992, 1996) has made reference to democracy as a form of government as a prerequisite for solving today's worldwide ecological problems.

²¹ Hansard (2011) Parliament Bill. November 1947. Vol 444. pp. 203-321. Available at: <http://hansard.millbanksystems.com/commons/1947/nov/11/parliament-bill> [Accessed 29 Jan 2014]

the actions of twenty-first century society can be far greater and more harmful to the future than at earlier points in history. Just as during the eighteenth-century, when Alexis de Tocqueville wrote about the need for “checks and balances” to protect the minority from the “tyranny of the majority”, today we are in need of “checks and balance” in order to guard against the tyranny of the present over the future. A state is constituted by three attributes: territorial boundaries, a people (demos) and governmental authorities. Governmental authority shall, as the basic concept of the division of powers stipulates, be distributed among several branches. *“All state authority originates from the people. It is exercised by the people in elections and votes and through certain institutions of the legislature, executive authority as well as through judicial practice.”*²² This is how it is put in Article 20, paragraph 2 of the German constitution, which forms the legal basis of the separation of powers through explicitly naming the three branches of authority. State authority is separated so that power does not become too centralised. Legislative (law-making), executive (administrative) and judicial (legal) authorities act to keep each other in check and limit each other’s power. If one takes as a point of departure that the principle of the sovereignty of the people applies to voters in political society both today *and in the future*, it follows that, constitutionally, Article 20 should be modified to reflect this fact. It could, for example, be reformulated in the following manner (new words in italics): “All state authority originates from the people. It is exercised by the people in elections and votes and through certain institutions of the legislature, executive authority, judicial practice *and the representation of future generations.*”

Above only a few words have been added, but they would be enormously foundational and consequential. Foundational, since such a constitutional change must be justified by comprehensive deliberation. This call is both directed at legal studies and at political philosophy. It is for political philosophers to clarify which organisational form of the state is desirable and should be sought after. Such a constitutional change would be far-reaching, even revolutionary. Developed and refined in the modern era by Harrington, Locke and Montesquieu in the seventeenth- and eighteenth-century, the idea of a separation of powers between the legislative, executive and judicial branches – the *trias politica* principle – is universally established in the Western democratic world. Any student who has studied politics is at least somewhat familiar with the concept. The separation of or, more specifically, the interconnection of the three branches is addressed in every constitution. Usually not just one, but a considerable number of single paragraphs are dedicated to it. If a fourth branch would be added, this would be a significant development of democracy as we know it.

‘Division of powers’ is a concept that is open to various interpretations. In order to at least maintain a core for the purposes of a working definition, the concept shall henceforth primarily refer to the *horizontal* meaning of the term. This appears to provide for the highest subsequent possibility of an extension of the concept, which would institutionally anchor the interests of future generations. To clear up any misunderstanding: The horizontal division of powers can be found at different federal levels – in many countries, the regional entities (States in the US, Länder in Germany, départements in France) have political institutions of their own: state governments, state parliaments and states constitutional courts. But an intellectual overburdening of the concept is not advised. Neither the separation of powers outlined by Harrington, featuring an advisory and a decision-making body, nor John Locke’s division of powers into a legislative, executive and a federal branch, established themselves. Steffani’s (1997) extension of the division of powers model to account for six similar dimensions (horizontal, temporal,

²² German original: “Alle Staatsgewalt geht vom Volke aus. Sie wird vom Volke in Wahlen und Abstimmungen und durch besondere Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung ausgeübt.”

vertical, constitutional, deliberative, social) is too extreme. It also goes without saying that the power of the political system does not penetrate all other spheres such as the economy, science, the media, religion or personal relations. In systems theory terms: Since these spheres are autonomous, the power of the political system is constrained. But in order to avoid misunderstanding, the *terminology* of a 'division of powers' should continue to refer to the organisation of the political authorities. Steffani's broadening into other societal fields leads to conceptual confusion. In the rest of this article, 'division of powers' shall refer to the *horizontal* meaning of the term.

The notion of an extension of the separation of powers model is an institutionalist answer to the so-called 'motivational problem' of generational politics. Philosophers, psychologists and political scientists understand the problem as follows: How can one motivate individuals and society to interact with each other in a generationally just and sustainable manner? How can a political society based upon the seductiveness of presentism be replaced by a precautionary politics in the interests of posterity? With the notion of a fourth branch, this question answers itself. A polity forces itself to do so when it embarks on this path. The German term "Vierte Gewalt" (literally translated as "fourth force", a much more martial concept than the English "fourth branch of government") describes this eloquently.

An extension of the separation of powers model could initiate some power struggles at first. Power struggles between the branches were quite normal in history when a two- or three branch system was in place but the competencies were unclear and had to be settled. For instance in the US after the Supreme Court was established pursuant to Article III of the United States Constitution in 1789, it took several decades until it was clear which constitutional powers this institution had in cases of conflict with the legislative or the executive. In Germany the political era 1815-1918 that historians call Frühkonstitutionalismus (early constitutionalism) was also marked by power struggles between the branches of government.²³ But after a transition period, the four-powers model would become as firmly established as the three-powers model is today. Moreover, it is definitely compatible with the sovereignty principle. Most modern constitutions do not equate 'sovereignty of the people' with 'sovereignty of the parliament'. Instead, 'sovereignty of the people' is equated with sovereignty of all branches, including the judiciary.

The cuboid of institutions against presentism

If the term 'institutions' is broadly defined, it encompasses organisations, laws, norms and all other sorts of societal arrangements. In the following, all institutions are classified and displayed in a cuboid (cf. fig. 2). This heuristic tool will help to distinguish those that will be the focus of this text from the rest.

a) Constitutional and other legal clauses: Some constitutions mention *expressis verbis* the 'rights' of future generations: Norway (Art. 110b); Japan (Art. 11); Iran (Art. 50); Bolivia (Art. 7); and Malawi (Art. 13).²⁴ Others contain language that relates to ecological or financial sustainability such the "protection of

²³ In principle, power struggles are never *completely* settled as they are inherent in the trias politica model and would also be inherent in a fourth-branch system of government.

²⁴ An attempt to establish greater generational justice in the German constitution was undertaken by young members of the Bundestag between 2003 and 2009, initiated by the Foundation for the Rights of Future Generations. Different approaches were discussed, but never a direct intervention in the division of powers model. For information on the (in the end unsuccessful) initiative of establishing a legal basis for generational justice in the constitution, see Tremmel (2012), 109-111; Wanderwitz/Friedrich/Lührmann/Kauch (2008).

the natural basis of life" in 20a of the constitutional law of the Federal Republic of Germany or the 'debt brake' in article 126 of the Swiss constitution.²⁵

b) Codes of conduct, self-commitments, acting morally: One strand of the literature argues that present MPs should impartially consider the interests of future generations rather than ensuring representation of future generations.²⁶ It is very questionable if this will ever happen to the necessary extent.²⁷

Nevertheless, it might be acknowledged that such a moral behavior by present MPs would be (or 'is', as it happens to a small extent) an 'institution' that benefits future generations.

c) Organisations with a specific mandate for the representation of future generations

All the heterogeneous, informal a) and b) institutions mentioned above differ in important respects from staffed organisations with by-laws that dedicate them to the aim of countering political presentism. While the aforementioned organisations/institutions *consider* future generations, the c) institutions with a well-defined mandate *represent* them. These two variations (representing future people/considering future people) make up the cuboid's horizontal axis. This article deals only with the institutions that represent future people. The extension-of-powers approach assumes the need for a full-fledged and staffed organisation.

Kates divides all proposals to represent future generations into three broad families: (1) representative proxies; (2) differential voting schemes; and (3) countermajoritarian devices.²⁸ He defines: "The basic idea of proxy representation, first, is that since the choices that democratic societies make now have a potentially enormous impact on citizens later, a select number of seats in the current legislative assembly ought to be reserved for representatives of future generations." In contrast to that, I understand proxies first and foremost as organisations to represent future generations, separately from the legislature. This corresponds with the first of the two variants that Göpel distinguishes:²⁹

"A) Commissions created by way of a constitutional amendment or a legal provision. Its members are either appointed by the president of the respective country or elected by the general population. They are not required to have previously been members of parliament, and their term of office usually does not overlap with that of the parliament.

b) Parliamentary committees created by a change in the structure of the parliament and comprised of elected members of parliament. The term of office of the members of these parliamentary committees overlap that of the other members of parliament."

²⁵ Lists of these can be found in UN (2013), 25-27; World Future Council (2013); Tremmel (2006, 192-196); Earthjustice (2007), 126-147; Brown-Weiss (1989).

²⁶ Jensen (2013)

²⁷ In my view, there is massive empirical evidence to show that incentives are more promising than appeals to present people to act impartially with regard to future people. The question of what factors are necessary for acting in an other-regarding manner – the 'motivation' problem, as it is called nowadays – has been extensively discussed in the ethical systems of Plato, Spinoza, Hume and Kant, and this everlasting debate reverberates until the present. For a good summary, especially with regard to future generations, see e.g. Birnbacher (2009), with further references.

²⁸ Kates (2011), 16.

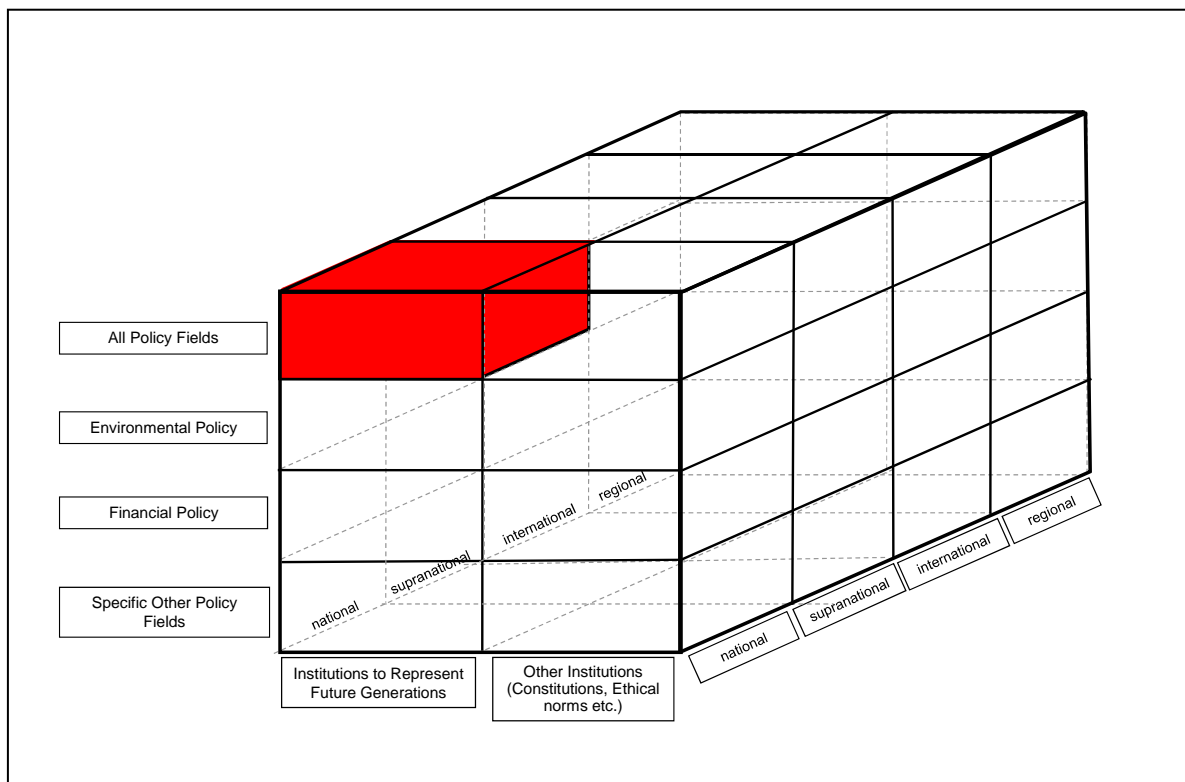
²⁹ Cf. Göpel/Arhelger (2010). See also World Future Council (2010).

Organisations to represent future generations can vary in scope. Those dealing with all areas of policy making must be distinguished from those only dealing within a few selected policy fields. The vertical axis of the cuboid shows this distinction. In the case of the latter, the policy areas in question are usually environmental or finance policy. However, other policy fields are also conceivable, e.g., pension, health, education or labour policy. Prima facie, a fully fledged 'future branch' branch of government would have to deal with all policy fields without any restrictions.

Regarding the third axis: The sustainability institution can be established at the international, supranational (as EU law or a new EU institution), national or a sub-national/regional level. This is depicted by the diagonal plane. Politics still occurs primarily on a national level. This is also the level that is conceptualised by Locke, Montesquieu and others. This historical article thus focuses on the national level. Some adaptations would be necessary for the European or UN level, as the *trias politica* (to the extent that it is at all applicable at that level) has a different structure. This area might become increasingly important in the future but at present it cannot compare with the significance of the national level.

Each sub-cuboid represents a potential separate number of case studies. This heuristic tool is thus well-suited to exploring the 'uncharted territory' in the 'universe of cases'. For the reasons outlined above, the top left quadrant of the vertical axis becomes the primary concern of this article.³⁰

Figure 2: The cuboid of institutions against presentism



³⁰ Power is not only asserted by politician, but of course, also by a multiplicity of interest groups (businesses, trade unions, the church, NGOs, consumers, etc.). But the scope of this article is delimited to the political sphere, as it is this sphere for which the concept of the *trias politica* was developed.

Looking at this sub-cuboid only, can we find any case studies? Anything that looks like the antecedents of a future branch of government? The two most influential organisations for the representation of future generations worldwide that ever existed were most likely the *Commission for Future Generations* in Israel from 2001 to 2006 and the *Ombudsman for Future Generations* from in Hungary from 2008 to 2011. The following is a short presentation of them both.

Commission for Future Generations, Israel

In March 2001, the Israeli parliament, the Knesset, established a new legal entity, called Commission for Future Generations (CFG). Its task was to screen all draft legislation for potential negative effects on future generations – regardless of the policy field.³¹ The head of the Commission was elected by an ad hoc committee in parliament and appointed by the parliament's president. Judge Shlomo Shoham (who was not an MP before) became the first Commissioner. The CFG was endowed with the right to introduce legislation. The Israeli solution involved a legal statute, not a constitutional amendment. The Commission's field of authority was not limited to environmental issues and the Commission had to be involved in the legislative process early on. When a prospective law was brought into parliament for a parliamentary reading, the Commission's evaluation of the law had already to be enclosed. The Israeli media included reports of the Commission's stance on a given law regularly and comprehensively.³² The commission was disbanded in 2005/2006. Shlomo Shoham, the commissioner, states: „(...) and after five years of deep and meaningful activity in parliament, a bill for the annulment of the Commission for Future Generations was brought before the members of the Knesset. The annulment bill is no longer valid. Although the speaker of the house is required to appoint a new commissioner, he has yet to do so and has been sought to minimize the Commission's authority. Much more will be written and said about the interests and forces that lay behind this bill. In reading the protocols it can be seen that there was not a single person willing to stand in front of the Knesset and say that there was not supreme importance in the existence of this body. There was talk of a different mechanism, or of different authorities, but nothing was said of the parliament's readiness to absorb within itself such an independent entity. We must see in the experience of the Commission for Future Generations a difficult but also courageous, touching and enlightening experiment.”

Ombudsman for Future Generations, Hungary

After over 20 years of discussion, the Parliamentary Commissioner for Future Generations was founded in Hungary in 2008 via a constitutional law (in effect until 2011). The first elected Commissioner was the lawyer Sándor Fülöp. The Office of the Parliamentary Commission for Future Generations started to work in 2008 with a full staff of 35 employees including 19 lawyers, two economists, one engineer, two biologists, a climate change expert and a doctor. The Office comprised four departments: Legal Department; Strategy and Science Department; Department for International Relations; and Coordination Department. In legal terms, the Commissioner held the status of a 'special ombudsman'.

³¹ Cf. Shoham/Lamay (2006).

³² Shoham/Lamay (2006).

The Hungarian ombudsman system consists of the 'general ombudsman' responsible for civil rights in general and three special ombudspersons in charge of ethnic and minority rights, privacy and freedom of information and, now, representation of future generations. The term of office for the commissioner/ombudsman was six years, exceeding the parliamentary term by two years. Only a two-thirds majority vote of the Országgyűlés, the Hungarian parliament, could terminate his mandate given certain exceptional reasons. The primary duty of the ombudsman pertained to the environment: to protect the nature-related conditions of the life and health of present and future generations; to preserve the common heritage of mankind and provide solutions to the common concerns of mankind; and to preserve freedom of choice, the quality of life and the unobstructed access to natural resources.³³ But the mandate of the ombudsman was not limited to the environment as he was allowed to take on other issues within the field of sustainability as well.

In the 2010 election, a coalition of Fidesz and KDNP won a two-thirds majority in parliament, and Viktor Orbán became head of government. The Hungarian Parliament passed a new constitution on 25 April 2011, changing the system of Ombudspersons. The Future Generations Ombudsman's powers were drastically restricted and his staff was reduced to four persons. After the resignation of Sándor Fülöp, the parliament elected Marcel Szabó, a widely respected law professor, on 8 October 2012 for a period of six years.

In addition to these two, there are a significant number of other organisations with the aim to promote sustainability and/or represent future generations. Germany has a 'Parliamentary Advisory Council on Sustainable Development' (Parlamentarischer Beirat für Nachhaltige Entwicklung), a 'Council of Experts for Environmental Affairs' (Sachverständigenrat für Umweltfragen), a 'Scientific Advisory Committee for Global Climate Change' (Wissenschaftliche Beirat für globale Umweltveränderungen), and a 'Council for Sustainable Development' (Rat für Nachhaltige Entwicklung). But all these organisations are not able to assert themselves. In the Netherlands, the so-called 'Central Planning Bureau' that is part of the ministry of Economic Affairs investigates before every election the proposed measures contained in the manifestos of political parties with regards to their financial effects. The 'Office for Budget Responsibility' fulfils a similar role in the United Kingdom. In Finland, the government is required to produce a prospective assessment of future circumstances, usually 10 years into the future. Furthermore, in Finland there is a parliamentary committee called the 'Committee for the Future', which answers questions regarding the aforementioned assessment. In Malta, in 2012 a 'Guardian for Future Generations' was created. In Wales, a 'Commissioner for Sustainable Futures' became institutionalised; in New Zealand, a "Keeper of the Long View". In Canada, there is an 'Auditor for Sustainable Development Strategies'. At the UN-level there are movements to establish an 'Ombudsperson for Coming Generations'.³⁴ Pressed by civil society, the Rio+20 declaration issued in § 86 that the secretary-general has „to provide a report on the need for promoting intergenerational solidarity for the achievement of sustainable development, taking into account the needs of future generations.“ This

³³ The first annual report of the ombudsman states among other things: "In order to increase the probability of compliance with recommendations, the Commissioner often takes advantage of media publicity, which has proved to be an effective tool of applying pressure on authorities and organization addressed in the statements." (Ambrusné 2010, 21). For the legal architecture of the Hungarian Ombudsman, cf. also Shindo (2013) and of course the law that established the Hungarian Ombudsmen system: Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights (Ombudsman), in: http://jno.hu/en/?menu=history&doc=LIX_of_1993#jno

³⁴ Alliance for Future Generations Rio+20 working group (2011).

report has been published in September 2013 with several proposals, one of them is an 'High Commissioner for Future Generations' within the UN system³⁵. But none of these further organisations compare to the Hungarian and the Israeli experiment.³⁶ In short, they all have either a purely advisory role or, if they have at least some competencies, they as such have little power in a Weberian sense.³⁷

Counterarguments against the extended power-sharing model with a future branch

There are two different kinds of counterarguments against the 4-branches-model presented above:

a) Arguments for a different institutional setup for organisations against presentism while acknowledging that future generations should be represented

b) Arguments against the representation of future generations

Let's deal with the former first. If a new SO (sustainability organization) is granted real force to act, it is already a variant of the extension of the division of powers model, even if it is not named as such. The only two variants are the "power to assert" and "powerless". If the representatives of the three established branches quarrel over the new SO, or they make concrete attempts to disempower it, the new SO constitutes a new branch of government – even if at first with a weak power base. The disempowerment of the above mentioned Hungarian ombudsman in 2011 as well as the commission in Israel 2005 was a clear indicator that these two organisations had already acquired the power to assert.

Let's come now to those arguments that totally oppose representation of future generations. There are voices that contest that future generations be represented at all. This is usually done on three grounds: 1) the uncertainty problem,³⁸ 2) the non-identity-problem³⁹ and 3) the thesis of the rich future.

The first two counterarguments are too complex to be dealt with here. It may suffice to say that both have been refuted. A third argument is that the interests of future generations will overrule the interests of present generations. But a limitation on the freedom of action of today's generations is considered to be unjustifiable. In this context, the hypothesis of a 'rich future' is relevant. It states: Since the lot of today's living generation is altogether smaller than that of future generations, it would be unjust to demand that today's living generation should make sacrifices to benefit future generations. Even the

³⁵ UN (2013),

³⁶ The number of organisations which represent future generations has in the meantime become considerable. All proposals in the literature for organisations that have not yet come to fruition cannot here be elaborated upon due to considerations of space. For further reading, see Barry (1999); Dobson (1996); Doeleman/Sandler (1998); Ekeli (2005); Goodin (1996); Kavka/Warren (1983); Schlickeisen (1994); Stein (1998); Wood (2004) and the second part of the *Handbook of Intergenerational Justice*, ed. Tremmel (2006).

³⁷ "Power is the probability that one is able to impose his own will on someone else within a social relationship, even if he encounters resistance." (Weber 1922, § 16)

³⁸ In comparison to questions of intragenerational justice, we have to deal with more uncertainty in the intergenerational context. But both the problem of what the needs of future generations will be and what effects our policies might have on them are solvable; see Tremmel (2009), 98-101 with further references.

³⁹ The NIP, for a time, achieved the status of a kind of paradigm in the Kuhnian sense, as understood by philosophers. They stopped discussing the rights or wrongs of it, and were concerned only about researching issues within the paradigm itself. But that was premature, as is shown in Tremmel (2009), 35-46.

deferral of ecological burdens – such a global warming – is considered to be legitimate, since the capacity to pay of future generations is believed to be greater than that of today's generation.⁴⁰

Caney explains what the 'rich future'-argument means with regard to climate change: "The thought here is that future generations will be wealthier than current generations and hence more able to pay; as such an 'ability to pay' criterion should allocate duties to them. This, in effect, amounts to a policy of not preventing climate change for now and then trying at some point in the future both to prevent further climate change and also to adapt to the changes that have occurred."⁴¹ According to this view, the argument that because of the abrupt climate change future generations will be worse off than they would have been without it has little weight. Because the lot of currently living generations *in sum* is worse than that of future generations, it would be unfair to demand a sacrifice from the current generation for the sake of future generations. There are certainly empirical facts to support this theory. For instance, the Human Development Index (HDI) has increased globally in recent decades despite the on-set of the climate change. For the *average* citizen of the world, who is the subject of intergenerational justice, per capita income, life expectancy and level of education are higher today than in the previous or pre-previous generations. In spite of this, the 'rich future'-argument remains unconvincing, because it implicitly suggests that it would be fair if a future generation were exactly as well-off as its predecessor. But intergenerational justice means making possible not an equally good but rather a *better* life for future generations. This is the result of an application of the 'Veil of Ignorance' in the intergenerational context. Thus, it supports the view that we should leave a better world to our descendants and it goes against the view that it suffices morally to leave behind a world that is as good as it was. Intergenerational justice means that the members of the next generation, on average, must be able to realize not an equal level of wellbeing, but a higher level. Now, if our normative obligations to future generations are greater than many ethicists assumed, the 'rich future'-argument loses its basis. The concept of 'intergenerational justice as making improvement possible' does not mean, however, that the current generation should make sacrifices for the next generation. If a resource has to be distributed between two generations of equal size, it is absolutely legitimate that each generation is guaranteed half of the good. But then how can a higher standard of living evolve for the later generation? This apparent paradox dissolves when one considers the autonomous factors of progress. Even if earlier generations neither save nor sacrifice, inventions and innovations that increase resource productivity will inevitably be discovered or created. The members of generation A do not have to give members of the next generation B more than they received; if they give them just as much, they implicitly enable their descendants to fulfil their own needs better than A. The precondition, however, is that catastrophes that could lead to rapid and extensive losses for human well-being be averted by the current generation. It is therefore the most important duty of every generation to avoid war and environmental, social and technical catastrophes.⁴²

Rapid, and thus dangerous, climate change is one of the potential catastrophes that could descend on coming generations. In the case of the climate change, future generations' costs for assimilation are presumably higher than the current generation's costs for prevention. In fact, it is not about money alone. We are currently setting the path to a scenario in which high numbers of dead and injured will be deplored in the future. As Caney points out, it would be immoral to *knowingly* cause harm to future

⁴⁰ Lomborg (2001), 323.

⁴¹ Caney (2010), 220.

⁴² Tremmel (2009), 170.

generations.⁴³ The fact that someone is in a position to redeem himself, for example in the case of theft, to personally replace the stolen good, does not legitimize the theft itself.

To sum up, the counterarguments against the four-branches-model to represent future generations are not convincing.

Key research questions

Now that the proposal for an extension of the established separation of powers of the legislative, executive and judicial branch through a “fourth branch for the representation of future generations” has been presented and defended, a new research field broadens out before us. At this point, it would be premature to sketch out the specifics of such an institution. Before that can take place, the following questions must be answered:

- What are the ideational and historical roots of the separation of powers concept?
- How was the three-branch-model implemented in practice historically, including until the present day? Is it possible to implement a ‘pure’ version?
- Drawing on the history of thought and the history of implementation of the three-branch-model, which theoretical inferences can be made about the four-branch-model?
- Should the fourth branch be able to suggest laws, stop them, or consider laws with veto power? Should it have a rather proactive or reactive role? Put differently: Should such a body be connected to the legislature in order to formulate sustainable laws? Or should its responsibility be to review whether laws meet the criterion of sustainability, which would seem to suggest that it should be conceptualised similarly to the judiciary?
- Should the sphere of competence of the new fourth branch limit itself only to specific policy areas? If so, which?
- How many members should the fourth branch have and which resources? How long should the terms of office be for members of? Who determines the salaries of the members of the fourth branch? Could members be forced to resign if they are guilty of misconduct?⁴⁴

⁴³ Caney (2010), 220.

⁴⁴ Here the question of indemnity and immunity is posed. According to Wikipedia, indemnity (accessed on 10.01.2013) refers to the exemption from penal (and often civil) prosecution. It presents a procedural obstacle to criminal proceedings, while immunity for representatives merely blocks criminal proceedings for the duration of their mandate and therefore does not present an actual obstacle to criminal proceedings. Indemnity is supposed to ensure that representatives can act only according to their conscience and that the functional capability of the parliament is guaranteed. The opportunity to have influence over the voting behaviour and the composition of the parliament through alleged or actual offences is taken away from the executive and judiciary. Political immunity refers to the protection of a political incumbent from criminal prosecution on the basis of his time in office. Parliamentary immunity has in the last 150 years become an object of legal protection. The aim has been to protect the emerging parliaments from the arbitrariness of the monarchical executive (for example, from invented accusations and arrest, which took place before important votes in the nineteenth century).

- Who could convene and how often? What should an assertive fourth branch – also mapped onto the constitutional level – for a specific country look like?
- To what extent should a fourth branch be conceptualised differently for each country?
- Independent of the formal and legal design of the fourth branch, with its competencies and instruments of power, is there anything else about its general framework which could benefit or hinder its success? What are they?

These paramount questions will keep researchers (esp. political scientists, law scholars and philosophers) busy for quite some time. Instead of hastening to answer all of them, this short contribution homes in on one of these foundational questions: What is the ideational and historical background and basis of the concept of the separation of powers?

3. The historical and ideational roots of the separation of powers

The historical and ideational roots of the separation of powers are widely associated with the political theorist John Locke and Charles de Montesquieu. Nevertheless, Aristotle had already recommended a mixed constitution, or, more precisely, a ‘polity’ based on a mixture of democratic and oligarchical rule. Strohmeier perceives its development as follows: “After Aristotle, a constitution is thought of as more durable the better the intermixture is, since the division balances the power of the various institutions.”⁴⁵ The Roman Republic came somewhat close to this ideal. The expatriated Greek Polybios (200-120 BC) characterised the Roman Republic as a mixed system, which combined various elements of well-known ‘pure’ forms of constitution. The monarch was represented by the consulate, the ‘aristocracy’ by the senate, and ‘democracy’ by the public forum.⁴⁶ Later generations, especially when they suffered under the rule of an autocrat, praised the Roman model. Machiavelli writes admiringly in his *Discorsi* (1531): “Rome benefited from the blessing that, although the monarchy and aristocracy gave way to democracy, it did not transpire that monarchical or aristocratic power was fully eliminated in order to empower the people; rather, a mixed form of government was the result, which later became a quintessential republic.”⁴⁷ Moreover, “when one condemns the struggles between the aristocracy and the people, one criticises – in my opinion – the first cause of the maintenance of Roman freedom. In doing so, man contemplates more the noise and racket of such struggles than the positive effects which emanate from them. One does not contemplate that in every republic the thought and aspirations of the nobility and the people are different and that out of this discord all laws which emerge do so in support of freedom.”⁴⁸ Freedom of the people through the weakness of those who govern them; this was also the foundational idea behind the system of “check and balances” that the Founding Fathers enshrined in the US constitution.

⁴⁵ Strohmeier (2004), 42.

⁴⁶ Polybios (2012).

⁴⁷ Machiavelli (1990), 136.

⁴⁸ Machiavelli (1990), 138.

John Locke

John Locke (1632-1704) concerned himself with the division of powers in his key work, the *Two Treatises of Government* (1689).⁴⁹ His point of departure is the imagination of man in a fictional state of nature. However, this does not last long, since the “inconveniencies that they are therein exposed to by the irregular and uncertain exercise of the power every man has of punishing the transgressions of others, make them take sanctuary under the established laws of government, and therein seek the preservation of their property. It is this that makes them so willingly give up every one his single power of punishing to be exercised by such alone as shall be appointed to it amongst them, and by such rules as the community, or those authorised by them to that purpose, shall agree on. And in this we have the original right and rise of both the legislative and executive power as well as of the governments and societies themselves.”⁵⁰

Locke derives both *public* branches directly from the fact that men surrender corresponding private courses of action available to them in the state of nature:

The first power—viz., of doing whatsoever he thought fit for the preservation of himself and the rest of mankind, he gives up to be regulated by laws made by the society, so far forth as the preservation of himself and the rest of that society shall require; which laws of the society in many things confine the liberty he had by the law of Nature. (...) Secondly, the power of punishing he wholly gives up, and engages his natural force (...) to assist the executive power of the society as the law thereof shall require.⁵¹

What about the judiciary? Is the eschewal of this third branch already ensured through the derivation of the executive and legislature? It is not. This is because, according to Locke, in the state of nature, every person was “judge and executioner”⁵² simultaneously, just as they were their own legislator and enforcer. Even the judicial branch could and must have been given up in the transition from the state of nature to the existence of the state in Locke’s thought experiment in order to establish a recognised and independent arbitrator. Locke, nevertheless, does not develop this line of thought. His design of the state distinguishes between a legislative and executive branch, but does not include an independent judicial branch.

According to Locke, at the first union of the people to form the state the majority had the “whole power of the community naturally in them.”⁵³ But does this not pose the risk of a “tyranny of the majority”? Even though he does not formulate the problem in these words, Locke appears to have foreseen this risk. He writes that since society was created “with an intention in every one the better to preserve himself (...), the power of the society or legislative constituted by them can never be supposed to extend farther than the common good.”⁵⁴

⁴⁹ Locke (1823), especially Chapter XII. p. 167-169. Emphasis in original. Before Locke, James Harrington, writing in *The Commonwealth of Oceana* (1991, first published in 1656), provided a contribution to the development of the division of powers model. However, from today’s perspective, his contribution is quite modest. This is the result not only of the great internal coherence of the later models, but also because the systems of Locke and Montesquieu proved to be better in practice.

⁵⁰ Locke (1823), Chapter IX, § 127 (p.160).

⁵¹ Locke (1823), Chapter IX, §§ 129-130 (p.160).

⁵² Locke (1823), Chapter IX, § 125 (p.159).

⁵³ Locke (1823), Chapter X, § 132 (p. 161).

⁵⁴ Locke (1823), Chapter IX, § 131 (S.161).

It is clear from Locke's writings that he envisaged a clear hierarchy of the branches of government: "This legislative is not only the supreme power of the commonwealth, but sacred and unalterable in the hands where the community have once placed it. Nor can any edict of anybody else, in what form soever conceived, or by what power soever backed, have the force and obligation of a law which has not its sanction from that legislative which the public has chosen and appointed."⁵⁵ Nevertheless Locke emphasised that the legislative branch should never function arbitrarily. In this regard, Locke commented on the relation between the legislative branch and the judiciary: "[T]he legislative or supreme authority cannot assume to itself a power to rule by extemporary arbitrary decrees, but is bound to dispense justice and decide the rights of the subject by promulgated standing laws, and known authorised judges."⁵⁶ Here the judiciary operates only as a subcommittee of the legislature. It merely regulates the activity of the legislature by enforcing the established rules of the game and nothing more. In contrast to the legislature, which does not have to be in office on a permanent basis, the law must be permanently obeyed and enforced. For Locke, it follows that the executive must hold office permanently. From this follows a necessary separation between the two branches.⁵⁷

The deeper reason behind the division of power is politicians' lust for power: "And because it may be too great temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government."⁵⁸ Voilà: the key argument for a separation of the branches of government according to Locke.

The twelfth chapter of Locke's book is entitled "The Legislative, Executive, and Federative Power of the Commonwealth". As a special case, Locke brings in the federative branch:

There is another power in every commonwealth which one may call natural, because it is that which answers to the power every man naturally had before he entered into society. For though in a commonwealth the members of it are distinct persons, still, in reference to one another, and, as such, are governed by the laws of the society, yet, in reference to the rest of mankind, they make one body, which is, as every member of it before was, still in the state of Nature with the rest of mankind, so that the controversies that happen between any man of the society with those that are out of it are managed by the public, and an injury done to a member of their body engages the whole in the reparation of it. So that under this consideration the whole community is one body in the state of Nature in respect of all other states or persons out of its community.⁵⁹

Locke names this third branch federative and assigns to it the power of "war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth".⁶⁰ In practice, however, Locke realises that the executive branch, which is inwardly directed, and the federative branch, which is outwardly directed branch are "always almost united"⁶¹. It would indeed be impractical if the government were responsible for the implementation of 'internal' laws, but not foreign

⁵⁵ Locke (1823), Chapter XI, § 134 (p. 162).

⁵⁶ Locke (1823), Chapter XII, § 136 (p. 163-164).

⁵⁷ Locke (1823), Chapter XII, § 144 (p. 168).

⁵⁸ Locke (1823), Chapter XII, § 143 (p. 167-168).

⁵⁹ Locke (1823), Chapter XII, § 145 (p. 168).

⁶⁰ Locke (1823), Chapter XII, § 146 (p. 169).

⁶¹ Locke (1823: 168)

policy. The command of rule of law – emphasised by Locke –, which is of great importance for the administration of the two ‘internal’ branches of the state, is limited with regards to foreign relations: “ (...) what is to be done in reference to foreigners depending much upon their actions, and the variation of designs and interests, must be left in great part to the prudence of those who have this power committed to them, to be managed by the best of their skill for the advantage of the commonwealth.”⁶²

All foundational theories of the state that describe the transition from a state of nature to a state-organised society – when one avoids imagining all men as part of a global society and contemplates the existence of a world state – face the problem of the external relations of states with each other.

Since Locke derives the division of powers very closely from the social contract, which he conceptualises for every state individually (e.g., for England, France and Germany), his model of the division of powers must also position itself in relation to it. He conceptualises the whole domain of foreign policy as an independent branch. The usage of the term ‘branches of government’ in reference to political domains – in the sense used today – had not yet established itself. Today, of course, we understand the judiciary to be the third branch of the *trias politica*s. With regards to content, Locke’s conception assumes a negative conception of human nature and he does not present a positive vision of the relations between states. This task is later taken up by Kant.

What remains of Locke’s project today? Primarily the notion of a separation of powers between the legislative and executive branches, excluding an independent judiciary.

Charles de Montesquieu

Charles de Montesquieu is considered the father of the separation of powers school of thought, which he deals with in his manuscript on the political principles of the state, *De l’esprit des lois*, written in 1748, which presents the classical three-part separation of legislative, executive and judicial branch.

Montesquieu dedicated the sixth and brief seventh chapter of the eleventh book as well as the second chapter of the sixth book⁶³ to the division and balancing of the branches. The most recognisable passage reads: “In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law. (...). The latter we shall call the judiciary power, and the other simply the executive power of the state.”⁶⁴ This marks the first classical three-part separation of the legislative, executive and judicial branches. The sixth chapter of the eleventh book features the title “Of the Constitution of England”, but should not be confused with the contemporary commentary on the same issue; above all that England neither back then had – nor today has – a written constitution

This special constitutional situation requires clarification. Since the beginning of the Middle Ages English constitutional law developed in a long, continuous process, in which certain institutional practices were taken from tradition. Little by little these traditions fulfilled the functions of a written constitutional text.

For this reason, a written constitution like in France or Germany was never adopted. Constitutional law and constitutional history are therefore far more intertwined in England than they are on the continent.⁶⁵

Albert Venn Dicey’s book on English constitutional law, written at the end of the nineteenth-century and

⁶² Locke (1823), Chapter XII, § 147 (p. 169).

⁶³ Montesquieu (2001), 173-184; 92-93.

⁶⁴ Montesquieu (2001), 173.

⁶⁵ See Möllers (2008), 26; Maitland (1961), Foley (1989).

considered a definitive work, does not mention the division of powers.⁶⁶ It would thus not be completely wrong to assert that, when writing about the English constitution, Montesquieu made – simply due to an error – some false statements.⁶⁷

He begins by describing the negative consequences if two or three branches were to collapse: “When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.”⁶⁸ In addition: “Hence it is that many of the princes of Europe, whose aim has been levelled at arbitrary power, have constantly set out with uniting in their own persons all the branches of magistracy, and all the great offices of state.”⁶⁹

In absolutist France this was considered a shocking line of thought, but it nevertheless established a clever and eternally valid sovereignty principle in support of state authority. Riklin formulates it in the following terms: “Because man, who has power, has a propensity to misuse power when he is not prevented from doing so by boundaries, it is necessary that power is divided between many authorities, which mutually prevent each other’s misuse”.⁷⁰ *Que le pouvoir arrête le pouvoir!*

It is thus not surprising that Montesquieu was in favour of a bicameral system for the legislative branch, which diffused its power further: “The legislative power is therefore committed to the body of the nobles, and to that which represents the people, each having their assemblies and deliberations apart, each their separate views and interests.”⁷¹ In reference to the actual status of the English House of Lords of that time, Montesquieu wrote: “The body of the nobility ought to be hereditary.”⁷²

The question of how often parliament should convene seems to have occupied Montesquieu. He writes: “Were the legislative body to be a considerable time without meeting, this would likewise put an end to liberty.”⁷³ But also: “It would be needless for the legislative body to continue always assembled.”⁷⁴ Finally, he reaches the conclusion that “it is fit, therefore, that the executive power should regulate the time of meeting, as well as the duration of those assemblies, according to the circumstances and exigencies of a state known to itself.”⁷⁵

This was precisely the major issue at the centre of a decade-long conflict between the English Crown and Parliament during the seventeenth-century. The Bill of Rights (1689) ended this struggle. One of its most important provisions stated that the King must convene Parliament at regular intervals.

⁶⁶ Möllers (2008), 26.

⁶⁷ Thank you to the American political scientist Dennis F. Thompson for his help with this part, which he offered me in personal correspondence with him.

⁶⁸ Montesquieu (2001), 173-174.

⁶⁹ Montesquieu (2001), 174.

⁷⁰ Riklin (2006), 290.

⁷¹ Montesquieu (2001), 177.

⁷² Montesquieu (2001), 177.

⁷³ Montesquieu (2001), 179.

⁷⁴ Montesquieu (2001), 178.

⁷⁵ Montesquieu (2001), 179.

Montesquieu wrote somewhat pejoratively about Aristotelian thought: "Aristotle is greatly puzzled in treating of monarchy. He makes five species; and he does not distinguish them by the form of constitution, but by things merely accidental, as the virtues and vices of the prince; or by things extrinsic, such as tyranny usurped or inherited. Among the number of monarchies he ranks the Persian empire and the kingdom of Sparta. But is it not evident that the one was a despotic state and the other a republic? The ancients, who were strangers to the distribution of the three powers in the government of a single person, could never form a just idea of monarchy."⁷⁶

When one takes up an 'ahistorical' position by holding his work up to the standards of later centuries, it is possible to charge Montesquieu with some failures. For example, he was by no means an advocate of equality before the law; of a *Justitia* with a blindfold. In this regard he wrote: "The great are always obnoxious to popular envy; and were they to be judged by the people, they might be in danger from their judges, and would, moreover, be deprived of the privilege which the meanest subject is possessed of in a free state, of being tried by his peers. The nobility, for this reason, ought not to be cited before the ordinary courts of judicature, but before that part of the legislature which is composed of their own body."⁷⁷

With regards to the right to vote, Montesquieu was also 'just' on par with his contemporaries: Women, the uneducated and those without property were all excluded from his 'democracy'.

The value of Montesquieu is that he was the first thinker to systematically theorise the role of the judiciary in the context of state authority. He extended the separation of powers model from two to three branches.⁷⁸ Such a separation of powers – which distinguishes itself from a mere division of the legislative branch into two chambers – was genuinely a novelty in the history of political thought. Until this day constitutional theory has occupied itself with a different theme, which Montesquieu himself addressed: How much interpretative freedom should judges have in interpreting the constitution?⁷⁹ On this question, Montesquieu wrote that "national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour."⁸⁰

Montesquieu, who was himself a judge at a feudal court, only qualifies the importance of the courts superficially. According to Möllers, the courts – through their low politicisation – are able to play a decisive role, since "they are not embedded in the mechanisms of mutual controls like the two other branches. They are far more institutionally autonomous due to their explicit independence from such mechanisms. They are thus not a threat to freedom, and are for Montesquieu (...) the least fearsome branch."⁸¹

There must be a veto right for the executive. "If the prince were to have a part in the legislature by the power of resolving, liberty would be lost. But as it is necessary he should have a share in the legislature for the support of his own prerogative, this share must consist in the power of rejecting. (...) Here then is the fundamental constitution of the government we are treating of. The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive power, as the executive is by the legislative. These three powers should naturally form a state

⁷⁶ Montesquieu (2001), 185.

⁷⁷ Montesquieu (2001), 180.

⁷⁸ There is one vexing passage: "Of the three powers above mentioned, the judiciary is in some measure next to nothing." (177) According to my reading of it, this passage has no discernible meaning.

⁷⁹ Concerning the difficult relation between textualism and intergenerational justice, see Auerbach/Reinhart (2012).

⁸⁰ Montesquieu (2001), 180.

⁸¹ Möllers (2008), 22 (own translation).

of repose or inaction. But as there is a necessity for movement in the course of human affairs, they are forced to move, but still in concert.”⁸²

Montesquieu proposes a large quantity of veto rights. Manfred G. Schmidt writes of a “system of interdependent veto rights”.⁸³ In contrast to the right of legislative initiative, the veto is a right of legislative prevention, which tends to be viewed under the suspicion of being destructive. Such a system of vetos would be unthinkable under autocratic rule.

Montesquieu contended that a people should not be directly, but only indirectly represented with regards to the legislature. He held that the population of “large states” are unsuited to negotiating public affairs.

⁸⁴ Just as it was appropriate to put the legislature in the hands of representatives, so it was right to put executive power in the hands of the monarchy, which should, according to Montesquieu’s vision, preside over a veto right concerning legislation.⁸⁵ The two legislative chambers should also be bound together through a mutual veto right.⁸⁶ Hence, for Montesquieu, the separation of powers is not the only factor, but also the offsetting of institutional power through balancing.⁸⁷ Strohmeier writes in praise of Montesquieu: “Charles de Montesquieu, the often-quoted ‘Apostle of the division of powers’, developed further the line of thought of earlier thinkers in the mixed constitutional tradition such as Locke and grounded his thought on the realisation of freedom and security.”⁸⁸

Although Montesquieu was French, his idea impressed the Americans more than his compatriots. Two historical events demonstrate this: The American Declaration of Independence (1776) and the French Revolution (1789). “Whilst Montesquieu’s thought was most likely the most influential continental contribution to the development of the constitution of the United States, his influence on the debates of the French Revolution was far less significant. Here presented itself the tricky problem of the relationship between the sovereignty of the people and the division of powers”,⁸⁹ writes Möllers. Due to the historical experience of courts and the Revolution, they were not known in France as the ‘the least fearsome branch’, but were treated with great mistrust. They were under no circumstances to become a corrective to a strong legislature. Probably the most important source of ideas during the French Revolution was Rousseau. For him, the sovereignty of the people is not only unalienable and indivisible, but also infallible and absolute. The *volonté générale* maintains the ultimate authority over the constitution, executive and the judiciary. They are, according to Rousseau, nothing more than servants of the sovereign.⁹⁰ Möllers clarifies further: “The democratic authority of government cannot, according to Rousseau’s conception of freedom – completely different from the other side of the Atlantic during the same period –, represent a threat to individual freedom. (...) Freedom emerges not from the absence of the state or through the constitution of pre-state or state-free spheres, but rather through its democratic construction.”⁹¹

⁸² Montesquieu (2001), 181.

⁸³ Schmidt (2008), 74 (own translation).

⁸⁴ Montesquieu (2001), 176.

⁸⁵ Montesquieu (2001), 181.

⁸⁶ Montesquieu (2001), 181.

⁸⁷ See Schmidt (2008), 72; Riklin 1989.

⁸⁸ Strohmeier (2004), 47.

⁸⁹ Möllers (2008), 22 (own translation).

⁹⁰ Rousseau (1981), 315.

⁹¹ Möllers (2008), 23 (own translation).

Federalist Papers

The division of powers found its first usage in a modern constitution in 1787/88⁹², as the guiding principle of the constitution of the United States' system of checks and balances. After the North American colonies issued their Declaration of Independence (4 July 1776) and had liberated themselves from British rule through the War of Independence (1775-1783), they at first remained in a loose federation, based on the legal framework of the Articles of the Confederation, which were agreed upon in 1777 and came into force in 1781. But the Confederation proved itself to be too weak as a form of government. "The Confederation was not able to pass even the first tests of strength – whether it was about a conflict over the division of the burdens of war, a struggle over demands to unexplored areas in West America, a conflict over the inflationary effects of monetary policy of some member states or political unrest, such as Shay's rebellion, which unsettled Massachusetts in 1786 (...). Even more telling: Without radical reform of the Union the relapse into new dependency on foreign powers was a distinct possibility", writes Schmidt.⁹³ The Continental Congress was closer to a meeting of foreign ministers than representation of the people.⁹⁴ The coming into existence of the constitution of 1787/88 was shaped through the conflict between the federalists, who were supporters of the constitutional draft, and the anti-federalists, who were opposed to its ratification.

In a total of 85 articles of the world-famous *Federalist Papers*, Alexander Hamilton (1755-1804), James Madison (1750-1836) and John Jay (1785-1829) made the case for a draft constitution that could form the basis of a more capable and stronger state.⁹⁵ The *Federalist Papers*, which were published during 1787 and 1788 as a series of newspapers articles addressed primarily at the electorate of the back then swing state of New York, are recognised as the first and most important commentary on the American constitution. Montesquieu, who was quoted at length, and Locke were the most important European sources of inspiration.

The division of powers idea appears to have established itself in political consciousness shortly after Montesquieu's writings. In *Federalist Paper no. 47* the idea is referred to as an "invaluable precept in the science of politics".⁹⁶ At the beginning of the same paper, the author of the idea of a division of powers is quoted. The question of how Montesquieu's model was implemented in the constitutions of the 13 former British colonies – and the lessons that can be drawn – is investigated. The author of no. 47, James Madison, concludes that neither a strict separation of the branches nor a too strong amalgamation is sensible. The authors of *The Federalist Papers* were admirers of the Roman Republic – they even chose 'Publius' as their pseudonym⁹⁷ – because they saw a mixed constitution at work there, which through the fusion and division of powers produced a balance between the powerful individuals factions. Chinard remarks that "the senate represented the monarchical power, the senate the aristocratical, and the house the popular power".⁹⁸ Nevertheless the supporters were aware that the old conceptions could not suddenly be conferred upon the North America of the eighteenth-century.

⁹² The constitution was agreed upon during the constitutional conference known as the Philadelphia Convention in 1787, and ratified in 1788. Previously the thirteen colonies formed a confederation in accordance with the Articles of Confederation, which convened only on a regular basis in the form of the Continental Congress.

⁹³ Schmidt (2008), 98 (own translation).

⁹⁴ Adams/Adams (1994), xxviii.

⁹⁵ Hamilton/Madison/Jay (1993). Hamilton contributed 51 articles, Madison 29 and Jay five articles. The intellectual father of the division of powers doctrine in *The Federalist Papers* was Madison.

⁹⁶ Hamilton/Madison/Jay (1993), 301 (Nr. 47).

⁹⁷ According to Roman historiography, Publius Valerius Publicola is to be regarded as "Saviour of the ancient Roman commonwealth, who ended the tyranny of Tarquinius Superbus and established the Republic" (Bose 1989, 34). The Roman historian Polybios is also referred to by name in *The Federalist Papers* (Nr. 63).

⁹⁸ Chinard (1949), 51.

In no. 48 an important thesis is formulated: Under a monarchy, the *executive* – the monarch – is the most dangerous branch. However, in a representative republic, such as the USA, it is the *legislative* branch: “The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.”⁹⁹ The people should take all possible precautionary action to guard against an arrogation of power by the legislative branch. The Long Parliament in England (1641-1653) is an example which sounds a note of caution concerning such usurpation.

In addition, no. 48 deals with the question of how each branch can be prevented from encroaching upon the other two branches’ spheres of competency. Who determines the tenure of office of the judiciary and executive? Who is responsible for regulating the salaries of judges and members of government? If the legislature could determine such matters at its own discretion, it would have an immense source of influence over the other two branches. In no. 48, Madison reaches the following conclusion: “The conclusion which I am warranted in drawing from these observations is, that a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.”¹⁰⁰

A solution is presented by the same author in no. 51: “To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”¹⁰¹ In the final analysis it means nothing other than that the parliament, president and the judges of the constitutional court must be elected by the people. Nonetheless, Madison advocated for the relaxation of this principle with regards to judges who were regarded as particularly well-qualified. But representatives of all branches should at least be independent from each other with regards to income.

In practice, the system of check and balances was implemented in the following way: Characteristic of the political system in the USA is the “principle of double representation”. The House of Representatives is elected every two years, in line with the basic principle of general, free, equal elections and with a secret ballot. The election is direct, which means that the voters vote for their representative directly, not via the electoral college, which is used to elect the president. Next to the ‘House’ exists in the tradition of bicameral parliaments, which has as its source the British Parliament, the senate; one-third of the senate is reelected every two years and its members represent the states. As a result, citizens as well as individual states are represented. The bicamerally conceived legislature implies at the same time a strengthening of the executive. The law-making branch is, however, able to exercise influence over the executive because of its competency to impeach. Also belonging to the system of checks and balances is the requirement, stipulated by Thomas Jefferson, amongst others, that the term of office of the president should be limited. Jefferson was in fact unable to establish this principle directly during the drafting of the constitution, but he was able, as president, to found the constitutional tradition that a president should only be able to serve two terms at most, which prevented him from gaining a safe reelection in 1809.¹⁰² There are, however, other aspects to the fusion of powers: The senate and the

⁹⁹ Hamilton/Madison/Jay (1993), 308 (Nr. 48).

¹⁰⁰ Hamilton/Madison/Jay (1993), 308 (Nr. 48).

¹⁰¹ Hamilton/Madison/Jay (1993), 319 (Nr. 51).

¹⁰² See Heun (1995), 94.

executive branch work together to control patronage. And the executive affects the judiciary through its power to nominate and the law-making branch through its right of veto. The judiciary can impact on the sphere of influence of the legislative and executive through its power of judicial review.¹⁰³ It is worth highlighting that the US Supreme Court had a clearly enhanced status when it is compared either with the Lockean model, or with constitutional practices in France, England or even Germany at that time. The US constitution may have established the most powerful constitutional jurisdiction in constitutional history to date, even if this was completely unforeseeable from its original text. In the famous case *Marbury v. Madison*, the Supreme Court ruled that it was within its sphere of competency to declare federal acts unconstitutional and thus to annul them. In any case, *The Federalist Papers* (above all no. 78) had already made it clear that the judiciary of the United States should fulfil “night watchman functions and have competencies to monitor laws”.¹⁰⁴ As ‘guardians of the constitution’¹⁰⁵ federal judges are unchallengeable and not bound by the voting of the people. The exceptional status of federal judges makes it clear that they should enjoy “special protection against the dangers, which accrue from their frontline position in relation to the other two branches”.¹⁰⁶ This constituted a break with the earlier English tradition, which stated that it was not for the judiciary to interpret (constitutional) law, but to protect old and natural legal principles.

The US constitution is one of the oldest republican constitutions still in force today. What is its significance after the passing of time? It demonstrates definitively the practicality of the principle of the sovereignty of the people, not only for small states, but also for large nations. A divine legitimation for rule became henceforth obsolete in liberal-democratic political thought.¹⁰⁷

With regards to the model of the division of powers, the contribution of the *Federalist Papers* is accurately associated with the notion of checks and balances: When the branches are effective in keeping each other in check (not only formally, but also de facto), they are considered to be balanced. Zehnpfennig puts it in the following way: “The central point of the plea for a new constitution in the *Federalist Papers* was the invalidation of the argument that it would incentivise the abuse of power. Put positively, the question was how it could be ensured that citizens’ freedoms would be protected. The answer: through the limitation of power. This even applied – seemingly paradoxically – to the power of the people. A mixed constitution, which binds the competing powers to one another, allows for the unilateral action of individual societal interests to form opposition, and through the system of checks and balances provides a balancing of powers, is the only guarantee that freedom does not revert to one of two extremes, namely anarchy or dictatorship.”¹⁰⁸ This constituted a break with the thought of antiquity, since neither Plato nor Aristotle held that such precautions were necessary for an ideal constitution. The *Federalist Papers* were the next step towards a global consensus on the three-branch model. At the same time they had their particularities. The American version of the division of powers doctrine can only be understood when one takes into account the distinctive meaning of freedom to the citizens of the

¹⁰³ Hamilton/Madison/Jay (1993), 36. (Introduction by Zehnpfennig). That the highest judges are nominated by the executive (the president) is certainly problematic according to the basic principle of a division of powers.

¹⁰⁴ Schmidt (2008), 107 (own translation).

¹⁰⁵ Hamilton/Madison/Jay (1993): “Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both: and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former” (No. 78, 1).

¹⁰⁶ I.c.

¹⁰⁷ In a different way from the Vatican City, whose constitution begins as follows: “The Pope, as head of the Vatican City, presides over full legislative, executive, and judicial power.” (Art. 1). As representative of Christ, his claim to rule is legitimated by God.

¹⁰⁸ Hamilton/Madison/Jay (1993), 7 (introduction by Zehnpfennig) (own translation).

13 states prior to the establishment of the United States of America. Individual freedom was to be threatened as little as possible by a social contract. In case of doubt, no government was preferred. Or, in the words of Möllers: “Every centralisation remained a potential threat to freedom. For this reason, the concern of the American theory of the division of powers is (...) in doubt the blockade of government, not its enablement.”¹⁰⁹

So far a historical and ideational summary of the division of powers has been described. Due to considerations of space, classical thinkers such as Hobbes (1588-1679), Rousseau (1712-1778) and Kant (1724-1804) will not be touched upon.¹¹⁰ The Hobbesian contract of subjugation postulated that the power of the Sovereign is a prerequisite for peace among subjects. Protection can only be secured by the state. In contrast, the authors of *The Federalist Papers* (above all, Madison) emphasised protection *from* the state, in line with the Lockean tradition.

From the past to the present

Today, the division of powers is an important structural principle of every constitutional democracy. The legislature enacts laws, while the executive implements them and the judiciary monitors compliance with the constitution. The division of powers provides an internal mechanism of control, which, within the institutions of the state, works against the possible abuse of power. State authority is divided in order that it does not become excessively powerful. The three branches work to restrict each other. But a pure (horizontal) *division* of powers without an accompanying *intertwining* of the branches only exists in theory and has been demonstrated in practice to be unsuitable. However, the exact design of the intermixture differs from country to country. Some examples: Parliamentary democracy in Germany forgoes a strict division of powers between legislature and the executive concerning many positions. Firstly, the division of powers is breached since the Bundestag elects the Federal Chancellor (executive). Additionally, it is possible for the Bundestag as a legislative organ to remove – as per the rules – the Federal Chancellor, who is a part of the executive, through a vote of no confidence. The Bundestag also participates in the election of the Federal President and justices of Germany's national constitutional court, the *Bundesverfassungsgericht*. Furthermore, many members of the government are

¹⁰⁹ Möllers (2008), 31 (own translation). See the principle of “limited government” of the strongly bounded states, and Schmidt (2008), 110. For further analysis, see Manin (1994).

¹¹⁰ Hobbes (“Leviathan” 1651/2007) and Rousseau (“Du contrat social” 1762/1981) reject the idea of a division powers, but for different reasons. For Hobbes, men only overcome the fearsomely presented state of nature when they agree upon a social contract amongst themselves, which subordinates them to the rule and authority of an abstract body. Hobbes writes: “The only way to erect such a common power, as may be able to defend them from the invasion of foreigners, and the injuries of one another, and thereby to secure them in such sort as that by their own industry and by the fruits of the earth they may nourish themselves and live contentedly, is to confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, *unto one will*: which is as much as to say, to appoint one man, or assembly of men, to bear their person; and every one to own and acknowledge himself to be author of whatsoever he that so beareth their person shall act, or cause to be acted, in those things which concern the common peace and safety; and therein to submit their wills, every one to his will, and their judgements to his judgement.” Hobbes (2000), 105-106 (17. section).

For Rousseau the sovereignty of the people is not only unalienable and indivisible, but also infallible and absolute. The *volonté générale* has suzerainty over the constitution, the executive and the judiciary. According to Rousseau, these three are nothing more than the ‘servants’ of the sovereign.¹¹⁰ Möllers elucidates: “Democratic state authority can in this [Rousseau's, J.T.] conception of freedom – completely different from over the other side of the Atlantic – not pose a threat to individual freedom. (...) Freedom emerges not through the absence of the state, through the establishment of pre-state and state-free spheres, but through its democratic condition.”¹¹⁰

The more contemporary Kant accepted the principle of a division of powers, which already belonged to the canon of foundational political concepts in his day. On Kant's differentiated position, see his remarks in “Zum ewigen Frieden” (Kant 1795/2011, 23), as well as in the section “Staatsrecht” in “Metaphysik der Sitten” (Kant 1797/1968, §§45-49).

at the same time parliamentarians, which presents a personal intertwining of the branches. An especially clear break with the principle of the division of powers is the competency of the German constitutional court (a part of the judicial branch) to declare rulings which have legal force, and thus reach into the sphere of the legislature.

In general it is the case that in presidential systems the division of power is typically more rigid than in parliamentary democracies.¹¹¹ Hence, in the USA, the president and congress are elected separately. Both the president (through his veto power) and the congress (through the impeachment process) only have limited channels of influence over each other, but also clearly demarcated spheres of competency. Locke and Montesquieu's models were primarily concerned with the limitation of the power of absolutist rulers. The authors of constitutions in the eighteenth- and nineteenth-century battled against the complex limitation of fundamental freedoms. They were also troubled by the tyranny of legitimate institutions, namely parliamentary majorities (USA) or of courts (France). This shows that the basic idea of a division of powers can in principle not only be used with regards to the executive, but in reference to all three branches. At the same time the division of powers should not diffuse state authority to the extent that the state becomes powerless, since a powerless state cannot guarantee the freedom, security and equality of its citizens. An effective intertwining of powers is necessary to ensure that they do not enter into gridlock.¹¹² In the ideal scenario, the division of powers is a form of the division of labour.

In summary it is possible to say that the division of powers and their intertwining are two sides of the same coin. It follows from the aim of preventing a gridlock scenario that there is an objective need to make the separated branches interdependent. The intertwining of the established three branches accounts for a considerable amount of the clauses in the constitutions of modern democracies. Correspondingly large changes must be made if a fourth branch is to be established.

As a look at the classics demonstrates, there have always been different interpretations of the idea of a division of powers. One such interpretation is the division of powers as the functional and personal separation of the government, parliament and judiciary or within a parliament (bicameral system). However, in political science, the concept is sometimes defined in a wider sense.

While the idea of the classical 'horizontal' division of power – with its three-pillar principle of legislature, executive and judiciary – has a long ideational history, increasing attention has been paid in recent years to the 'vertical' division of powers. Above all it refers to the federalisation of political systems, such as in Germany, where there is a division of labour between the federal, state and local levels. The vertical axis is further extended by the existence of the European Union. In reference to the federal ('vertical') doctrine of separation, Steffani writes: "The federal doctrine of separation (...) sheds light on the system and the interdependency of territorial (including the international) political entities and their respective formative competencies and institutionally controlled effects on the civic freedoms of the individual."¹¹³ In this regard, the principle of subsidiarity is also of importance.

¹¹¹ Mastronardi (2007), 268.

¹¹² See Tsebelis (2002).

¹¹³ Steffani (1997), 44 (own translation).

Summary

The noblest function of history of political ideas - as a discipline - is to help us realize the *relativity* of our presence. We might have thought that a three branch system of government is without alternatives. Having looked into history, we now know this is wrong. Whoever previously thought that the division of powers of the state by definition referred to the three branches (legislative, executive and judicial) may wish to better inform himself though history. It is there that we find not the three-branch-model, but many different variations. This facilitates the thought that democracies all over the world in one hundred years might have “future branches” integrated into their political architectures.

What other lessons can be taken from this ideational and historical summary for the extension of the division of powers model in the future?¹¹⁴ Due to the differences in the institutional history of every country, the concept of a separation of powers has been shaped in a different way. Today, French constitutional law does not recognise constitutional jurisdiction commensurate to the Federal Constitutional Court of Germany. The French rubbed their eyes in amazement during the euro crisis, as the European Stability Mechanism (ESM) was endangered by the Federal Constitutional Court. How can a body that is not elected by the people have the right to correct the decisions of elected representatives of the people? What, if this is possible, remains of the principle of the sovereignty of the parliament? The point is that if the three-branch-model is indeed implemented differently in every country, this must have consequences for a four-branch model. Should a fourth branch be conceptualised differently for each country? The answer is yes. To devise only one institution for the representation of future generations could be too little; it would be far more appropriate to conceptualise the representation of futures people in different countries in different ways.

The aim of this paper was to identify the right questions, and provide answers only to a few of them. The new idea that the division of powers between the legislative, executive and judicial branches should be extended to include a future branch is now on the market of ideas. But the devil lies in the details.

¹¹⁴ For further reading: Casper (1997), amongst others, offers a good further analysis of the division of powers. A classic work is Loewenstein (1957).

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